FORWARD

There were five separate trials and appeals. The opinion of the Court of Appeals for the Seventh Circuit filed on November 30, 1971 covered all five cases and was set forth in full in the Petition for Writ of Certiorari. It is not being reprinted in the Appendix. The Judgment of the Court of Appeals follows the Index on page -v-. The Order Granting Certiorari appears on page -vi-.

The pertinent portion of the record in each case before the trial court are set forth individually as to case. The Index covers all five cases and their records.

All pages of the Appendix excepting the Forward, Index, Judgment of the Court of Appeals, Order Granting Certiorari and Title pages were photographically reproduced

from the same pages in the original Appendix in each case before the Court of Appeals. Numerals on the left side of certain pages refer to the original transcrip of the record filed with the Court of Appeals.

*** *** *** ***

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JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	Numbers
	)	18761
vs	)	18762
	)	18764
PAUL P. ERLENBAUGH, et al Defendants-Appellants	)	18765
	)	71-1140

November 30, 1971

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER GRANTING CERTIORARI

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1971

ERLENBAUGH, ET AL PETITIONERS	)	
vs	)	No. 71-839
UNITED STATES OF AMERICA RESPONDENT	)	

The Clerk of the Court by letter dat
March 6, 1972 advised that the Court on t
date entered the following order in capti
ed case:

"The petition for a writ of certiora
granted limited to Question 1, presen
by the petition, which reads as follo

'1. Whether the Court of Appeals erred
in not following the opinion of the Cour
of Appeals for the Fourth Circuit in a
1967 case entitled U.S. vs Arnold, 380
Federal 2nd, 366, thus creating a confli
between the circuits.'

Mr. Justice White took no part in the
consideration or decision of this
petition."

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 35
PAUL P. ERLENBAUGH, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 35)
DOCKET ENTRIES

4-10-69 Indictment filed. Praecipe for warrant filed. Warrants iss. and forw. to Marshal.

5- 9-69 Defendants, Paul P. Erlenbaugh and William H. Mitchell, present in court with counsel, Max Cohen. Defendants arraigned and plead NOT GUILTY to all counts. (Defendants request trial by jury. Defendants request time to file motion addressed to the indictment. Request granted. Defendants to file motion on or before May 23, 1969.

5- 9-69 Defendant, John C. Hintz, present in court with counsel, Theodore Puchowski. Defendant arraigned and plead NOT GUILTY to all Counts. Defendant requests trial by jury. Defendant requests time to file motion to indictment. Request granted to May 23, 1969.

6- 5-69 Defendants, Paul P. Erlenbaugh and William H. Mitchell, file Motion to Dismiss;

6- 5-69 Motion for Issuance of Subpoena Duces Tecum;

6- 5-69 Motion to Suppress;

6- 5-69 Memorandum in Support of Motion to Dismiss, Motion for Issuance of Subpoena Duces Tecum and Motion to Suppress; and

6- 5-69 Certificate of Service.

Docket Entries

6- 6-69 Defendant, John C. Hintz, files Motion to Dismiss; Motion for Issuance of Subpoena Duces Tecum; Motion to Suppress; and Memorandum in Support thereof.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is DENIED. (SE) BEAMER:J. (copies to counsel). Memorandum attached thereto.

6-29-70 Cause for trial. Government represented by J. Frank Kimbrough, Asst. U. S. Attorney. Defendants, Paul P. Erlenbaugh and William H. Mitchell, present with counsel, Max Cohen. Defendant, John C. Hintz, present with counsel, Ted Puchowski. Jurors sworn voir dire. Jury examined, selected accepted and sworn to try the cause: 1. Ethel Singer 2. Barlow Palmer 3. Josephine Mikuly 4. Mabel Brown 5. Shirley L. Dault 6. Lois Elaine Reiner 7. Theodore R. Lucas 8. Joseph Bonner 9. William Roach 10. Wm. C. McIntosh, Sr. 11. Leo Posiadlowski 12. Bernice Jasek Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants defer presentation of opening statement. Government presents evidence but does not conclude. Cause continued until Tues., June 30, 1970, at 9:30 a.m.

6-30-70 Trial resumed. Government presents further evidence, but does not conclude. Cause continued until Wednesday, July 1, 1970, at 9:30 a.m.

7- 1-70 Trial resumed. Government presents further evidence, concludes and rests. Defendants move for judgment of acquittal. Arguments heard. Motion denied as to Counts I, II and III. Motion granted as to Count IV. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, present opening statement. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, present evidence, conclude and rest. Defendant, John C. Hintz, presents evidence, concludes and rests. Government presents rebuttal, concludes and rests. Both sides rest. Government presents closing argument. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, presents closing argument. Defendant John C. Hintz, presents closing argument. Government presents final argument. Court tenders instructions 1 through 31 and gives all. Government tenders instructions 1 - 8. 1 and 7 are given as modified; all others refused. Defendants tender 1 - 17; 5 given as modified; all others refused. Court instructs jury. 5:33 p.m. Bailiff sworn. Jury retires to commence deliberation 5:35 p.m. Jury called back for further instructions. U. S. Marshal authorized to provide meal for jury. 8:25 p.m. Jury returns the following verdicts:

"We, the Jury, find the defendant, Paul P. Erlenbaugh, guilty as charged." signed—Theodore R. Lucas, Foreman

"We, the Jury, find the defendant, William H. Mitchell, Guilty on Count I, II and III." signed—Theodore R. Lucas, Foreman

"We, the Jury, find the defendant, John C. Hintz, Guilty on Count I, II and III." signed —Theodore R. Lucas, Foreman
Verdicts filed. Beamer-Yates.

8- 7-70 Defendant, William H. Mitchell, present in court with counsel, Max Cohen. Defendant sentenced: 2 yrs. impr. suspended, probation 3 years on each of Counts 1, 2 and 3, to run concurrently. Judgment and Order of Probation issued. (SE) Beamer:J

8- 7-70 Defendant, John C. Hintz, present in court with counsel, Theodore Puchowski. Defendant sentenced: 2 yrs. impr. suspended, probation 3 yrs. on each of Counts 1, 2 and 3, to run concurrently. Said sentence to run concurrently with sentence in 69 H CR 37. Judgment and Order of Probation issued. (SE) Beamer:J

8- 7-70 Defendant, Paul P. Erlenbaugh, present in court counsel, Max Cohen. Defendant sentenced: 2 yrs., 6 months to be served, remaining 1½ yrs. suspended and deft. placed on probation for 3 yrs. upon release. Stay of execution granted until Aug. 14, 1970, at 9:00 a.m. Judgment and Commitment issued. (SE) Beamer:J
Defendants to remain on bond previously filed pending appeal.

8-12-70 Defendants, Paul P. Erlenbaugh, William H. Mitchell, and John C. Hintz, file Notice of Appeal.

9-21-70 Court reporter files three (3) volumes of trial transcript.

THE INDICTMENT

1 COUNT I

(Filed Apr 10 1969) (Caption No. 35)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment,

2 and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Paul P. Erlenbaugh, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash

Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Paul P. Erlenbaugh would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the
3 Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, John C. Hintz.

(f) It was a further part of the said conspiracy that John C. Hintz, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Paul P. Erlenbaugh and William H. Mitchell, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

Indictment

At the approximate times hereinafter mentioned, the defendants Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof.

1. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a rear entrance at 103 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, accepted a horse bet at 103 State Street, Hammond, Indiana.

4. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a rear entrance at 103 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

6. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, accepted a horse bet at 103 State Street, Hammond, Indiana.

7. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

8. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, ac-

cepted a horse bet at 103 State Street, Hammond, Indiana.

9. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, Paul P. Erlenbaugh, was present at 103 State Street, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 27th day of August, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, William H. Mitchell and John C. Hintz, did use and cause
5 to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 28th day of August, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court the defendants, William H. Mitchell and John C. Hintz, did use and cause to

be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the
6 said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 24th day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana

to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moeliering
Alfred W. Moeliering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice

37 MOTION TO DISMISS

(Filed Jun 5 1969)(Caption No. 35)

Come now the defendants, Erlenbaugh and Mitchell, and move the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendants are charged in a four-count indictment with violation of Title 18 U.S.C. Sections 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicated upon the use of an interstate facility, to-wit: the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendants to carry on an unlawful activity, to-wit: bookmaking on horse races.

38 3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper

sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b). As a further ground for dismissal of all counts of the indictment, defendant Erlenbaugh avers that prior to the date of his arrest and his indictment, he had been obliged for many years last past, under threat of federal prosecution, to comply with the registration requirements of 26 U.S.C. 4401 et seq.

4. Defendant Erlenbaugh's compliance with 26 U.S.C. 4401 et seq violated his privilege against self-incrimination and provided the Government with information which led to the initiation of the present prosecution and which further provided the Government with substantial evidence to prove an essential and material element of the charge, to-wit: that defendant is engaged in gambling, in violation of the laws of the State of Indiana. That after the defendant for many years had complied with the provisions of 26 U.S.C. 4401 et seq, the Supreme Court of the United States has held that the registration provisions of said Act are unconstitutional in that they violate the privilege against self-incrimination. That it was defendant's coerced compliance with the provisions of 26 U.S.C. 4401, which said registration was made public information and available to agents of the Federal Bureau of Investigation, which led to the initiation of the present prosecution against the defendant Erlenbaugh.

5. Unless the Government concedes that defendant Erlenbaugh's compliance with the wagering tax provisions provided the Government with information and evidence

provided the Government with information and evi-
39 dence which led to the initiation of the prosecution of

the defendants, defendants request an evidentiary hearing on this motion to dismiss in order to establish that it was defendant Erlenbaugh's coerced compliance

with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

6. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Max Cohen
Max Cohen
Attorney for Defendants, Paul P. Erlenbaugh and William H. Mitchell, 475 Broadway, Gary, Indiana.

45 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS
(Filed Jun 5 1969)

I.

The Motion to Dismiss

The first ground asserted for relief in the motion to dismiss is predicated on the contention of defendants that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210 F. Supp. 456, affirming 325 F. 2d 148, C.A. 7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

46 In U. S. v. Kelly (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication" . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380 F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of Title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility to promote an unlawful activity within the meaning of Section 1952, which was contemporaneously enacted.

There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not interdicted by the Act.

II.

The Second Ground of the Motion to Dismiss, the Motion to Suppress and the Motion to Issue Subpoena Duces Tecum

The basis for the relief requested in these motions is essentially the same; that the defendant Erlenbaugh's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and
47 investigative leads which led to the initiation of the present prosecution.

In Marchetti v. U. S., 390 U.S. 39 (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that

a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restrictions on the use of the information collected under the statute because of the evident congressional purpose to provide aid to prosecutors.

In Marchetti, Justice Harlan noted:

> "Information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties . . . Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained. Finally, we are obliged to notice that a former Commissioner of Internal Revenue has acknowledged that the Service 'makes available' to law enforcement agencies the names and addresses of those who have paid the wagering taxes, and that it is in 'full cooperation' with the efforts of the Attorney General of the United States to suppress organized gambling, Caplin, The Gambling Business and Federal Taxes . . . Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide informa-

tion which he might reasonably suppose would be available to prosecuting authorities and which would surely prove a significant link in the chain of evidence tending to establish his guilt. . ."

48 Justice Harlan went on to note that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and compels injurious disclosures which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses; that the acquisition of a federal gambling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which the government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rationale which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C.

49 4741 et seq. In Leary v. U.S., 5 Cr. Law Reporter, BNA 3053 and U.S. v. Covington, 5 Cr. Law Reporter, BNA 3068.

Support for the evidentiary hearing requested in the case at bar is found in U. S. v. Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b) 4, which permits the District Court to conduct factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.

Respectfully submitted,
/s/ Max Cohen
Max Cohen,
Attorney for Defendants, Paul P. Erlenbaugh and William H. Mitchell,
475 Broadway, Gary, Indiana.

51 MOTION TO DISMISS

Come now the defendant, John C. Hintz, and moves the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendant is charged in a four-count indictment with violation of Title 18 U.S.C. Section 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicated upon the use of an interstate facility, to-wit: the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendant to carry on an unlawful activity, to-wit: bookmaking on horse races.

3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b).

4. That as a further ground for dismissal one of the co-defendants herein, has for years, under threat of federal prosecution, complied with the registration requirement of 26 U.S.C. 4401 et seq.

5. That as a result of the compliance with 26 U.S.C. 4401 et seq the Government had access to and was provided with substantial evidence to prove an essential and material element of the charge to-wit; that the defendants did violate Sections 10-2304, 10-2311 and 10-2331 of 52 Burns Indiana Statutes (1956 Replacement).

6. That the Supreme Court of the United States has held that those sections of 26 U.S.C. 4401 regarding registration are unconstitutional in that they violate the privilege against self-incrimination.

7. Unless the Government concedes that defendants compliance with the wagering tax provisions provided the Government with information and evidence of the prosecution of the defendants, defendants request an evidentiary hearing on this motion to dismiss in order to establish that it was defendants coerced compliance with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

8. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendant John C. Hintz
2824 173rd Suite B
Hammond, Indiana

57 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS

I.

THE MOTION TO DISMISS

The first ground asserted for relief in the motion to dismiss is predicated on the contention of defendant that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210 F. Supp. 456, affirmed 325 F. 2d 148, C.A.7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

In U.S. v. Kelly (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380 F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility
58 to promote an unlawful activity within the meaning of Section 1952, which was contemporaneously enacted.

There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question

is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not inderdicted by the Act.

II.

THE SECOND GROUND OF THE MOTION TO DISMISS, THE MOTION TO SUPPRESS AND THE MOTION TO ISSUE SUBPOENA DUCES TECUM

The basis for the relief requested in these motions is essentially the same; that the defendant Erlenbaugh's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and investigative leads which led to the initiation of the present prosecution.

In Marchetti v. U.S., 390 U.S. (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restriction on the use of the information collected under the statute because of the evident congressional purpose to provide aid to prosecutors.

Justice Harlan noted that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and complete injurious disclosures which may provide or assist in the collection

of evidence admissable in a prosecution for present offenses; that the acquisition of a federal gambling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

59 Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rational which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C. 4741 et seq. In Leary v. U.S., 5 Cr Law Reporter, BNA 3053, and U.S. v. Covington, 5 CR Law Reporter, BNA 3068.

Support for the evidentiary hearing requested in the case at bar is found in U.S. v. Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b) 4, which permits the District Court to conduct factual hearings prior to

trial if necessary to resolve issues of fact peculiar to the motion.

Respectfully submitted,
/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendant John C. Hintz
2824 173rd Suite B
Hammond, Indiana

72 ORDER (Caption No. 35)

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

95 (Caption No. 35)

We, the Jury, find the defendant, Paul P. Erlenbaugh, guilty as charged.

July 1, 1970

/s/ Theodore R. Lucas
(Foreman)
Theodore R. Lucas

96

We, the Jury, find the defendant, William H. Mitchell,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III

July 1, 1970

/s/ Theodore R. Lucas
(Foreman)
Theodore R. Lucas

97

We, the Jury, find the defendant, John C. Hintz,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III

/s/ Theodore R. Lucas
(Foreman)

(Caption No. 35) Theodore R. Lucas

102 On this 7th day of August, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Title 18, Section 371—Conspiracy as charged in 1 Count of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and Convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, 6 months to be served. The remaining 1½ Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release.

It Is Adjudged that defendant is granted a stay of execution until August 14, 1970, at 9:00 a.m. at which time defendant shall surrender himself to the United States Marshal at his office in Hammond, Indiana.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

A True Copy. Certified this 11th day of August, 1970
(Signed) /s/ Francis T. Grandys
Clerk.
(By) /s/ Marilyn Stjkic
Deputy Clerk.

103 On this 7th day of August, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Title 18, Section 371 - Conspiracy; Title 18, Section 1952(a) (3) and (2) - Interstate Transportation in Aid of Racketeering; and Aiding and Abetting as charged in 3 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that defendant is sentenced to Two (2) Years, which sentence is suspended and defendant is placed on probation for a period of Three (3) Years as to each of Counts 1, 2 and 3, to run concurrently.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abid-

ing, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.
/s/ Francis T. Grandys
Clerk.

104 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

United States of America
v.
John C. Hintz
} No. 69 H CR 35

On this 7th day of August, 1970, came the attorney for the government and the defendant appeared in person, and[1] by counsel

It Is Adjudged that the defendant upon his plea of[2] not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy
Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting

as charged[3] in 3 Counts of Indictment and the court having asked the defendant whether he has anything to

say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that[1]

defendant is sentenced to TWO (2) YEARS which sentence is suspended and defendant is placed on probation for a period of THREE (3) YEARS as to each of Counts 1, 2 and 3, to run concurrently. Said sentence to run concurrently with sentence imposed in 69 H CR 37.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

105 NOTICE OF APPEAL (Caption No. 3

Notice is hereby given that Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 7th day of August, 1970.

Dated: August 12, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 37
ADRIAN J. WHITE, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 37)
DOCKET ENTRIES

Date	Proceedings
4-10-69	Indictment filed. Praecipe for warrant filed. Warrants iss. and given to Marshal.
5- 9-69	Defendants, Adrian J. White, John C. Hintz and James Lloyd, present in court with counsel, Theodore Puchowski. Defendants plead Not Guilty to all counts. Defendants request trial by jury. Defendants request time to file motion to indictment. Request granted to May 23, 1969.
6- 9-69	Defendants, file Motion to Dismiss; Motion for Issuance of Subpoena Duces Tecum; Motion to Suppress; with Memorandum in Support thereof.
12-29-69	Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is Denied. (SE) Beamer:J. (copies to counsel). Memorandum attached thereto.
6-16-70	Cause for trial. Government represented by Frank Kimbrough, Asst. U. S. Atty. and Marvin Loewy. Defendants present in person and by counsel, Ted Puchowski. Jury sworn voir dire. Jury examined, selected, accepted and sworn to try this cause: 1. Joseph J. Violanti 2. Vernice Washington 3. Delmar J. Zeiters 4. Thomas Economou 5. Harold F. Singer 6. William Kovach 7. Eugene Janeczko 8. Wil-

liam Sako, Jr. 9. Donald E. Proffitt 10. Leonard R. Vail 11. Rose Ann Michnik 12. Robert Beison Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants present opening statement. Government presents evidence, concludes and rests. Cause continued until Wednesday, June 17, 1970, at 9:30 a.m.

6-17-70 Trial resumed. Defendants move for judgment of acquittal. Arguments heard. Motion denied. Defendants rest without presentation of any evidence. Government tenders instructions numbered 1-14. Court gives 1 as modified, 2 as modified, 3 as modified, 4 as modified, 5 as modified, 8, 9 as modified, and 10. All others refused. Defendants tender no instructions. Government presents closing argument. Defendants present closing argument. Government presents final argument. Court instructs the jury. Bailiff sworn. 1:30 p.m. Jury retires to commence deliberation. U. S. Marshal authorized to provide meals for the jury. 2:00 p.m. Jury returns into open court with following verdicts: We, the Jury, find the defendant, Adrian J. White, Guilty on Ct. I, II, III, and IV. signed Joseph J. Violanti, Foreman. We, the Jury, find the defendant, John C. Hintz, Guilty on Count I, III, and IV. signed Joseph J. Violanti, Foreman. We, the Jury, find the defendant, James Lloyd, Guilty on Count I and II. signed Joseph J. Violanti, Foreman. Verdicts filed. Jury discharged.

Defendants to stand at liberty on bond heretofore filed. Govt. moves to withdraw exhibits 7, 8, 9 and 10 and submit copies. Motion granted. Matter referred to probation office for pre-sentence investigation. George N. Beamer, Judge. Gerry R. Yates, Court Reporter.

8- 7-70 Defendant, James Lloyd, present in court with counsel, Theodore Puchowski. Defendant sentenced: 2 yrs. sentence suspended and defendant placed on probation for 3 yrs. as to each of Counts 1 and 2, to run concurrently. Judgment and Order of Probation issued. (SE) Beamer: J

8- 7-70 Deft. John C. Hintz present in court with counsel T. Puchowski. Defendant sentence: 2 years, which sentence is suspended and def. placed on probation for a period of 3 years as to each of Counts 3 and 4, to run concurrently with sentence imposed in 69 H CR 35. Judgment and Order of Probation issued. (SE) Beamer: J.

8- 7-70 Deft. Adrian J. White present in court with counsel T. Puchowski. Deft. sentenced: 2 year, 6 months to be served. The remaining 1-1/2 years is suspended and the deft. is placed on probation for a period of 3 years to begin upon release. It Is Adjudged that the defendant is granted a stay of execution until August 14, 1970, at 9:00 A.M. at which time defendant shall surrender himself to the United States Marshal at his office in Hammond, Indiana.

Judgment and Order of Probation issued. (SE) Beamer: J. Defendants to remain on bond previously filed pending appeal. Probation requirements suspended pending appeal.

8-12-70 Defendants, Adrian J. White, John C. Hintz and James Lloyd, file Notice of Appeal.

8-31-70 Court reporter files trial transcript held on 6-16-70 and 6-17-70.

1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 37) • •

COUNT I
(Filed Apr 10 1969)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Adrian J. White, John C. Hintz and James Lloyd, the defendants did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce, with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Section 10-2304,

10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Adrian J. White, would manage and carry a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered to the defendants by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant Adrian J. White, would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the

Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, John C. Hintz.

(f) It was a further part of the said conspiracy that John C. Hintz, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Adrian J. White and John C. Hintz, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Adrian J. White, John C. Hintz and James Lloyd, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, James Lloyd, received copies of the Illinois Sports News in the vicinity of the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, James Lloyd entered 658 State Street, Hammond, Indiana.

3. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted copies of the Illinois Sports News from James Lloyd, defendant, at 658 State Street, Hammond, Indiana.

4. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted a horse bet at 658 State Street, Hammond, Indiana.

4 5. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

6. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered 658 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News..

7. On the 23rd day of October, 1968, in the Northern District of Indiana, defendants, John C. Hintz and Adrian J. White, accepted horse bets at 658 State Street, Hammond, Indiana.

8. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

9. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered 658 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

10. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted a horse bet at 658 State Street, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 19th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White, and James

Lloyd, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1965 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 23rd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to per-

Indictment

form acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 24th day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill

/s/ Frank A. Hollingshead

Foreman

Motion to Dismiss
(Caption No. 37)

33 MOTION TO DISMISS

(Filed Jun 6 1969)

Comes now the defendants Adrian J. White, John C. Hintz, and James Lloyd, and move the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendants are charged in a four-count indictment with violation of Title 18 U.S.C. Section 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicted upon the use of an interstate facility, to-wit; the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendant to carry on an unlawful activity, to-wit: bookmaking on horse races.

3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b).

4. That as a further ground for dismissal that defendant Adrian J. White has for years under threat of federal prosecution, complied with the registration requirement of 26 U.S.C. 4401 et seq.

5. That as a result of the compliance with 26 U.S.C. 4401 et seq the Government had access to and was provided with substantial evidence to prove an essential and material element of the charge to-wit; that the defendants did violate Sections 10-2304, 10-2307,

34 10-2311 and 10-2331 of Burns Indiana Statues (1956 Replacement)

6. That the Supreme Court of the United States has held that those sections of 26 U.S.C. 4401 regard-

Motion to Dismiss

ing registration are unconstitutional in that they violate the privilege against self-incrimination.

7. Unless the Government concedes that defendant White's compliance with the wagering tax provisions provided the Government with information and evidence which led to the initiation of the prosecution of the defendants, defendants request on evidentiary hearing on this motion to dismiss in order to establish that it was defendants coerced compliance with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

8. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendants Adrian J. White, John C. Hintz, and James Lloyd
2824 173rd Suite B
Hammond, Indiana

35-36 • • •

Memorandum in Support of Motion

37 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS

(Caption No. 37) I.

THE MOTION TO DISMISS
(Filed Jun 6 1969)

The first ground asserted for relief in the motion to dismiss is predicated on the contention of the defendant that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210F. Supp. 456, affirmed 325 F. 2d 148, C.A. 7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

In U.S. v Kelly, (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of Title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility to promote an unlawful activity within

the meaning of Section 1952, which was contemporaneously enacted.

38 There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not erdicted by the Act.

II.

THE SECOND GROUND OF THE MOTION TO DISMISS, THE MOTION TO SUPPRESS AND THE MOTION TO ISSUE SUBPOENA DUCES TECUM

The basis for the relief requested in these motions is essentially the same; that the defendant White's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and investigative leads which led to the initiation of the present prosecution.

In Marchetti v U.S., 390 U.S. (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restriction on the use of the information collected under the state because of the evidence congressional purpose to provide aid to prosecutors.

Memorandum in Support of Motion

Justice Harlan noted that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and complete injurious disclosures which may provide or assist in the collection of evidence admissable in a prosecution for present offenses; that the aquisition of a federal gambeling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions. or federal laws forbidding the use of interstate facilities for gambeling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

39 Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rational which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C. 4741 et seq. in Leary v U.S., 5 Cr Law Reporter Bna 3053 and U.S. v Covington 5 CR Law Reporter, BNA 3068.

Order

Support for the evidentiary hearing requested in the case at bar is found in U.S. v Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b)4, which permits the District Court to conduct factual hearings prior to trial necessary to resolve issues of facts peculiar to the motion.

Respectfully submitted,
/s/ Theodore Puchowski
Theodore Puchowski
Attorney for defendants Adrian J. White, John C. Hintz, and James Lloyd
2824 173rd Suite B
Hammond, Indiana

40-50 • • •

51 (Caption No. 3) ORDER

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

52-115 • • •

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

JAMES LLOYD

No. 69 H CR 37

FILED
JUN 17 1970
FRANCIS I. GRANDYS, CLERK

Jury Verdict

We, the Jury, find the defendant, James Lloyd,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count II

June 17, 19 70
(Date)

Joseph J. Verlanti
(Foreman)

A. O. Form No. 156 (May 1956) Verdict

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

JOHN C. HINTZ

No. 69 H CR 37

FILED

JUN 17 1970

A. FRANCIS T. GRANDYS, CLERK

Jury Verdict

We, the Jury, find the defendant, John C. Hintz,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count III
X	___	on Count IV

June 17, 1970.
(Date)

Joseph G. Gorcan ti
(Foreman)

A. O. Form No. 158 (May 1965)

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

ADRIAN J. WHITE

No. 69 H CR 37

FILED
JUN 17 1970
FRANCIS T. GRANDYS, CLERK
At M

Jury Verdict

We, the Jury, find the defendant, Adrian J. White,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count II
X	___	on Count III
X	___	on Count IV

June 17, 19 70.
(Date)

Joseph J. Violanti
(Foreman)

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. JAMES LLOYD Cr. 69 HCR 37 (H Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2 yrs/ sentence suspended. Probation 3 yrs. on each count sentence to run concurrently.

Fine: _____

Probation: _____

Condition of Probation: _____

Judgment and Order of Probation issued: 8/7/70 M.S.

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. JOHN C. HINTZ Cr. 69 HCR 37(H) Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

#324 Juvenile

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2yrs. suspended. Probation 2yrs on each count. sentence to run concurrently. W 69 H Cr 35 as to Cts 1, 3-14

Fine: _____

Probation: _____

Condition of Probation: _____

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. ADRIAN J. WHITE Cr. 69 HCR 37 (E) Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2 yrs — 6 months to be served. Upon release from ~~penal~~ institution left ~~to be~~ placed on probation for 3 yrs on terms of ~~probation~~ sentence to run concurrently with sentence stayed until Aug 14 1970 at 9:00 AM pending intention to file appeal otherwise to surrender to marshal on said date and time.

Fine: _____

Probation: _____

Condition of Probation: _____

122-123 • • • (Caption No. 37)

124 **NOTICE OF APPEAL**

Notice is hereby given that Adrian J. White, John C. Hintz and James Lloyd, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 7th day of August, 1970.

Dated: August 12, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 36
FRANK J. KELLY, DEFENDANT	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

Docket Entries
(Caption No. 36)
APPENDIX

4-10-69 Indictment filed. Praecipe for warrants filed. Warrants iss. and given to Marshal.

5- 1-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.

5- 2-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

5- 9-69 Defendant, Frank J. Kelly, present in court with counsel, Charles W. Grubb.
Defendant advised of his right to have trial by jury.
Defendant arraigned and plead Not Guilty to all counts.
Defendant requests time to file motion to indictment. Request granted to May 23, 1969.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is denied. (SE) Beamer: J. (Copies to counsel). Memorandum attached thereto.

6-25-70 Government appears by Asst U. S. Attorney J. Frank Kimbrough and Marvin Loewy.
Defendant appears in person and by counsel Charles Grubb.
Cause called for trial by Jury. Prospective jurors in attendance, called and sworn on voir dire. The following were examined, selected, accepted and sworn to try this cause: (1) Richard Broadnax (2) Howard M. Slifko, Sr. (3) Gertrude Spanik (4) Arthur J. Kush (5) Marion D. Lindsley (6) Paula Vandermolen (7) Viola Reynolds (8) Juanita M. Williams (9) George S. Jarosz (10) James F. Razumich (11)

Mary L. Jamroz (12) Robert L. Huffman. Government makes opening statement by Marvin Loewy. Defendant makes opening statement. Defendant moves for the separation of witnesses. Motion granted. Government presents evidence and rests. Cause continued to 9:30 A.M. June 26, 1970

6-26-70 All parties present. Jury in attendance. Trial resumed. Defendant presents evidence and rests. Government offers Rebuttal evidence and rests. Both sides rest.

Government tenders instructions 1 to 9; Court accepts amended instructions 2, 4, 6 and 7 and gives 3, 5 and 9 as tendered. 1 and 8 are refused. Defendant tenders instructions 1 to 4; Four is accepted, all others refused.

Government presents final argument.

Defendant presents final argument.

Government presents closing argument.

Court charges the jury by giving its own instructions 1 to 22 inclusive, Defendant's instruction 4 and Government's instructions 2, 4, 6 and 7 as modified and gives 3, 5 and 9 as tendered.

3:10 P.M. Jury retires to deliberate upon a verdict in charge of sworn bailiff.

6:05 P.M. Jury returns into court with following verdict: "We the jury find the defendant, Frank J. Kelly, guilty as charged in the indictment" dated 6-26-70 Howard M. Slifko, Sr., Foreman

Jury discharged. Defendant to stand at liberty on bond heretofore filed. Matter referred to Probation officer for pre-sentence investigation.

8-14-70 Defendant, Frank J. Kelly, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs, impr., 6 mos. to be served, remaining 1-1/2 yrs. suspended and deft. placed on probation for 3 yrs. following release, as to each of Counts 1 and 3, to run concurrently. Defendant to remain at liberty on bond previously filed pending appeal. Judgment and Commitment issued. (SE) Beamer: J.

8-14-70 Deft., Kelly files Notice of Appeal.
Clerk's Certificate of Mailing issued and forwarded to counsel.
(Cert. copy of Docket Entries and Notice forwarded to U. S. Court of Appeals)

9-17-70 Court reporter files trial transcript held on 6-26-70.

1 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 HCR 36) • •

COUNT I
(Filed Apr 10 1969)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly and Charles R. Buckler, the defendants herein named, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against

the United States, to wit: to use and cause to be used a facility in interstate commerce, with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants, Raymond Morris Goodman and Frank J. Kelly, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Raymond Morris Goodman would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said

copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of the said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendants, Gary Gerald Goodman and Raymond Morris Goodman.

3 (f) It was a further part of the said conspiracy that Gary Gerald Goodman, Raymond Morris Goodman and Charles R. Buckler, the defendants, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Frank J. Kelly and Raymond Morris Goodman, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly and Charles R. Buckler, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 4th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 4th day of September, 1968, in the Northern District of Indiana, defendants Gary Gerald Goodman and Raymond Morris Goodman left the South Shore Train Station carrying copies of the Illinois Sports News.

3. On the 4th day of September, 1968, in the Northern District of Indiana, defendant Gary Gerald Goodman, entered Marty's Tap, 519 Conkey Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

4 4. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, left the South Shore Train Station carrying copies of the Illinois Sports News.

6. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, upon leaving the South Shore Train Station gave copies of the Illinois Sports News to the defendant, Charles R. Buckler.

7. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Charles R. Buckler, entered the Calumet Tap, 4950 Calumet Avenue, East Chicago, Indiana, carrying copies of the Illinois Sports News.

8. On the 5th day of September, 1968, in the Northern District of Indiana, defendant Frank J. Kelly, accepted a horse bet at 517 Conkey Street, Hammond, Indiana.

9. On the 22nd of October, 1968, in the Northern Distric of Indiana, defendant, Raymond Morris Goodman, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

10. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Raymond Morris Goodman, left the South Shore Station at 4531 Hohman Avenue,

Hammond, Indiana, carrying copies of the Illinois Sports News.

11. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Raymond Morris Goodman, accepted a horse bet at 517 Conkey Street, Hammond, Indiana.

5 COUNT II

The Grand Jury further charges:

On or about the 4th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond Morris Goodman and Gary Gerald Goodman, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 5th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the de-

fendants, Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly, and Charles R. Buckler, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

6

COUNT IV

The Grand Jury further charges:

On or about the 22nd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond Morris Goodman, and Gary Gerald Goodman did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage,

7

carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice
8-12 • • •

13 UNITED STATES DISTRICT COURT

• • (Caption No. 69 H Cr No. 36) • •

MOTION TO DISMISS INDICTMENT
(Filed May 1, 1969)

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on April 10, 1969, and for a discharge of all defendants therein charged, on the ground that the allegations contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P. O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 1st day of May, 1969.

United States Attorney
N D of Ind. Hammond Divisior
By: /s/ Dorothea Snyder

14 UNITED STATES DISTRICT COURT
• • (Caption No. 69 H Cr No. 36) • •

BRIEF IN SUPPORT OF MOTION
TO DISMISS INDICTMENT
(Filed May 2, 1969)

The defendants stand charged with violating Section 1952 (a) (3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs

Illinois Bell Telephone and Kelly vs UPI in (7th CCA) 325 Fed. Facts in 210 F. Supp. 456 2nd 148. See also US vs Kelly (1964, Ky.) 328 (6th CCA) Fed. 2nd 227.

A 1967 decision in US vs Arnold, (4th CCA) (Va) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility' • • • to • • • promote • • • any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts".

We must construe Sections 1952 and 1953 in pari materia. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under

the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility is not banned. This is not the use of an interstate facility intended under Section 1952.

16 It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request a dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb, Attorney
for Defendants
P.O.Box 354, Cedar Lake, Ind. 46303

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 2nd day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

Order, Verdict and Judgment

17-58 • • • (Caption No. 36)

ORDER

59 (Filed December 29 1969)

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

91 "A" UNITED STATES DISTRICT COURT

• • (Caption No. 69 HCR 36) • •

VERDICT

(Filed June 26, 1970)

We, the Jury, find the defendant, Frank J. Kelly, guilty as charged in the Indictment.

6/26, 1970 (Date) — Howard M. Slefko, Sr. (Foreman)

92 RECORD OF ARRAIGNMENT OR DISPOSITION

Date: August 14, 1970 At: Hammond, Indiana
U. S. vs. Frank J. Kelly Cr. 69 HCR 36 (H) Div.
Defendant present in court with counsel (a) Charles W. Grubb

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.
Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads:

Sentence: As to each of Cts. 1 and 3 2 yrs impr. 6 mos. to be served. remaining 1 1/2 yrs. suspended and placed on probation for 3 yrs. following release.

Fine: to run concurrently.

Probation:

Deft. to remain at liberty on bond previously filed pending appeal.

Condition of Probation:

Judgment and Commitment issued: 8/14/70 M.S.

93 IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69 HCR 36) • •

NOTICE OF APPEAL
(Filed August 14, 1970)

Notice is hereby given that Frank J. Kelly, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 14th day of August, 1970.

Dated: August 14, 1970

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendant.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 41
RAYMOND J. KULIK, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 41)

DOCKET ENTRIES

5-22-69 Indictment filed. Praecipes for Warrants filed.

6- 6-69 Defendants, Raymond J. Kulik and Eddie Dobrowski, present in court with counsel, Charles W. Grubb. Defendants arraigned and plead Not Guilty to all 5 Counts. Defendants request and are granted to June 20 to file motion to indictment.

6-17-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.—

6-17-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is denied. (SE) BEAMER: J.
(copies to counsel). Memorandum attached thereto.

7- 8-70 Govt appears by J. Frank Kimbrough, Asst. U. S. Atty., and Marvin Loewy.
Defts. Raymond J. Kulik and Eddie Dobrowski appear in person and by counsel, Charles Grubb. Cause called for trial by jury. Prospective jurors called and sworn on voir dire. The following were examined, selected, accepted, and sworn as jurors to try this cause: 1. Richard Zuniga; 2. Roberto Cruz; 3. Otis Shivers; 4. Harry G. Gentry; 5. Ronald G. Piercy; 6. Ron-

ald E. Schuttrow; 7. Paul Banks; 8. Cora Landers; 9. Charles R. Gard; 10. Nicholas Ronish; 11. Etta Grady; and 12. William Artibey. Defts. move for separation of witnesses, Motion granted. Witnesses ordered separated.
Govt. presents opening statement.
Defts. reserve right to make opening statements at close of Govt. evidence.
Govt. presents evidence, concludes and rests.
Defts., out of the hearing of the jury, move for a directed verdict.
Motion denied.
Defts. present opening statements.
Defts. present evidence, conclude and rests.
Govt. presents evidence in rebuttal and rests.
Both sides rest.
Cause continued for further trial to July 9, 1970 at 9:30 a.m.
BEAMER: KNIGHT-YATES

7- 9-70 All parties present. Jury in attendance. Trial resumed.
Govt. presents final arguments. Defts. present final argument.
Govt. presents closing arguments. Defts. tender instructions 1 & 2, which are by the Court refused. Govt. tenders instructions 1 & 2 which are by the Court refused. Court charges the jury by giving its own instructions one to 31 inclusive. Jury retires to deliberate upon a verdict in charge of sworn bailiff. Jury returns into open court with following verdicts: "We, the Jury, find the deft., Raymond J. Kulik Guilty on Count 1; Guilty on Count II; Guilty on Count III and Guilty on Count V.

We, the Jury, find the deft., Eddie Dobrowski, guilty on Count I; Guilty on Count IV; and Guilty on Count V. July 9, 1970. Signed, Richard Zuniga, Foreman.
Defts, to stand at liberty on bond heretofore filed. Matter referred to Probation Officer for pre-sentence investigation.

8-14-70 Defendant, Raymond J. Kulik, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs. impr., 6 mos. to be served, remaining 1-1/2 yrs. suspended and deft. placed on probation for 3 yrs. following release, as to each of Counts 1, 2, 3 and 5, to run concurrently. Defendant to remain at liberty on bond previously filed pending appeal.
Judgment and Commitment issued.
(SE) Beamer: J.

8-14-70 Defendant, Eddie Dobrowski, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs. impr., suspended, probation 3 yrs. as to each of Counts 1, 4 and 5, to run concurrently. Probation requirements suspended pending appeal. Judgment and Order of Probation issued. (SE) Beamer: J.

8-14-70 Defts., Kulik and Dobrowski file Notice of Appeal.
Clerk's Certificate of Mailing issued and forwarded to counsel.
(cert. copy of Docket Entries and Notice forwarded to U. S. Court of Appeals)

9-17-70 Court reporter files trial transcript held on 7-8-70 and 7-9-70. Yates, reporter.

1 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

COUNT I
(Filed May 22 1969)

The Grand Jury charges:

From on or about the 24th day of July 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October 1968, in the Northern District of Indiana and elsewhere, Raymond J. Kulik, Roy Woodward and Eddie Dobrowski, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Raymond J. Kulik, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants, would order and subscribe to copies of the Illinois Sports News which would be delivered to the defendants by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Raymond J. Kulik, would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore train from Illinois and deliver the said copies to the defendant Roy Woodward.

(f) It was a further part of the said conspiracy that Roy Woodward, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations

and places where horse race bookmaking would be carried on.

3 (g) It was a further part of the said conspiracy that Raymond J. Kulik and Eddie Dobrowski, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Roy Woodward, Eddie Dobrowski and Raymond J. Kulik, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 31st day of July 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 31st day of July 1968, in the Northern District of Indiana, defendant Raymond J. Kulik, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 31st day of July 1968, in the Northern District of Indiana, defendant Raymond J. Kulik, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

4. On the 7th day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 7th day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

4 6. On the 7th day of August 1968, in the Northern District of Indiana, defendant, Raymond J. Kulik,

accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

7. On the 15th day of August 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

8. On the 15th day of August 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

9. On the 15th day of August 1968, in the Northern District of Indiana, defendant Eddie Dobrowski, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

10. On the 21st day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

11. On the 21st day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

12. On the 21st day of August 1968, in the Northern District of Indiana, defendant Eddie Dobrowski, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 31st day of July 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the de-
5 fendants, Raymond J. Kulik and Roy Woodward, did use a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Ham-

mond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 7th day of August 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond J. Kulik and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of said unlawful activity in violation of Title 18, United States Code, Sections 1952 (a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 15th day of August 1968 at, Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Eddie Dobrowski and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2312, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT V

The Grand Jury further charges:

On or about the 21st day of August 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond J. Kulik, Eddie Dobrowski, and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and

facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns
7 Indiana Statutes (1956 Replacement), Sections 10-2304 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U.S. Department of Justice

21 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

MOTION TO DISMISS INDICTMENT

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on May 22, 1969, and for a discharge of all defendants therein charged, on the ground that, the allegations

contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P. O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 17th day of June, 1969.

United States Attorney
N D of Ind. Hammond Division
by: R. Litteral

22 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

BRIEF IN SUPPORT OF
MOTION TO DISMISS INDICTMENT
(Filed Jun 17 1969)

The defendants stand charged with violating Section 1952(a)(3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs Illinois Bell Telephone and Kelly vs UPI in 325 Fed. 2nd 148 (7th CCA) (Facts in 210 F. Supp 456). See also US vs Kelly (1964, Ky.) (6th CCA) 328 Fed. 2nd 227.

A 1967 decision in US vs Arnold, (Va) (4th CCA) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is

not the use of a 'facility' • • • to • • • promote • • • any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts."

We must construe Sections 1952 and 1953 in parimateria. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility intended under Section 1952.

It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P.O. Box 354,
Cedar Lake, Indiana 46303

Order and Verdict

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 17th day of June, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ R. Litteral

25-50 • • •
51 • • •

(Caption No. 41) ORDER

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

• • •

52-53 • • •
54-120 • • •

121 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

(Filed Jul 9 1970)

We, the Jury, find the defendant, Eddie Dobrowski,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count IV
x	.....	Count V

/s/ Richard Zuniga
(Foreman)

July 9, 1970.
(Date)

122 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •
(Filed Jul 9 1970)

We, the Jury, find the defendant, Raymond J. Kulik,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III
x	.....	Count V

/s/ Richard Zuniga
(Foreman)

July 9, 1970.
(Date)

123a

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H CR 41) • •

On this 14th day of August, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy
Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting

as charged in 4 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, 6 months to be served. The remaining 1-1/2 Years is suspended and defendant is placed on probation for a period of Three (3) Years to begin upon release, as to each of Counts 1, 2, 3 and 5, to run concurrently.

It Is Adjudged Defendant to remain at liberty on bond previously filed pending appeal.

A True Copy:
Attest: Francis T. Grandys, C.erk
By /s/ Hildred Bolsega
Deputy Clerk

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge.

The Court recommends commitment to:

/s/ Francis T. Grandys,
Clerk.

A True Copy. Certified this 18th day of August, 1970
(Signed) /s/ Francis T. Grandys
Clerk.
(By) /s/ Marilyn Stajkic
Deputy Clerk.

125 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H CR 41) • •

On this 14th day of August, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting as charged in 3 Counts of Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that defendant is sentenced to Two (2) Years, which sentence is suspended and defendant is placed on probation for a period of Three (3) years as to each of Counts 1, 4 and 5, to run concurrently.

Probation requirements suspended pending appeal.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Brandys
Clerk.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 HCR 41) • •

NOTICE OF APPEAL
(Filed Aug 14 1970)

Notice is hereby given that Raymond J. Kulik and Eddie Dobrowski, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 14th day of August, 1970.
Dated: August 14, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303

Tel.: 219-374-7056
Attorney for Defendants

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR
EDWARD JOSEPH MISIOLEK, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 38)
DOCKET ENTRIES

4-10-69 Indictment filed. Praecipe for warrant filed. Warrants Iss. and given to Marshal.

4-19-69 Charles W. Grubb, P. O. Box 354, Cedar Lake, Indiana, enters appearance for defendants.

4-25-69 Defendant, Edward Joseph Misiolek, present in court with counsel, Charles Grubb. Defendant advised of his right to have trial by jury.
Defendant arraigned and plead NOT GUILTY to all counts.
Defendant requests time to file motion to indictment.
Request granted to May 13, 1969.

4-25-69 Defendant, Robert Ray Tumlin, present in court with counsel, Charles Grubb. Defendant advised of his right to have trial by jury. Defendant arraigned and plead NOT GUILTY to all Counts.

4-25-69 Defendant, Robert Ray Tumlin, requests time to file motion to indictment.

(contd.) Request granted to May 13, 1969.

4-25-69 Defendant, Alex Strosky, present in court with counsel, Charles Grubb.
Defendant advised of his right to have trial by jury.
Defendant arraigned and plead NOT GUILTY to all counts. Defendant requests time to file

1-14-70 Govt. appears by J. Frank Kimbrough, Asst. U. S. Atty. Deft. Roy Woodward appears in person and by counsel, Charles W. Grubb.
Hearing to determine the mental competency of deft., Roy Woodward.
Deft. presents evidence. Court finds that the deft. is not capable to understand the charge against him or cooperating in his defense and is incompetent to stand trial. Deft. is ordered discharged. Same ruling entered in 69 HCR 34, 69 HCR 38, and 69 HCR 41.

12-14-70 Pltf. files motion to dismiss as to deft Barnett. Order of dismissal entered thereon. (SE) Beamer:J. (copies to counsel)

12-15-70 Govt. appears by J. Frank Kimbrough, Asst, U. S. Atty; Terry Lord and Michael King (Special Atty. Dept. Justice)
Defendants Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky appear in person and by counsel, Charles Grubb. Defendants to withdraw their motion to suppress evidence. Motion granted. Defendants withdraw their motion to suppress evidence. Cause called for trial by jury. Jury in attendance called and sworn on voir dire. The following were examined, selected, accepted and sworn to try this cause: 1. Charles J. Campbell 2. Faye Solomon 3. M. F. Wood 4. Lawrence Kleine 5. Adeline L. Litavech 6. Joyce A. Kunde 7. James H. Cloyd 8. Howard H. Westerman 9. John Sudroff 10. Nancy A. Jones 11. Fred C. Whitton 12. Joseph M. O'Brien. Parties file stipulation that case may be tried by less than

motion to indictment. Request granted to May 13, 1969.

4-25-69 Defendant, Roy Woodward, present in court with counsel, Charles Grubb.
Defendant requests continuance. Cause continued to May 9, 1969.

5- 1-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.

5- 1-69 Defendant, Roy Woodward, files Motion for Mental Examination of defendant Roy Woodward with proof of service thereon.

5- 2-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

5-19-69 Asst. U. S. Atty., J. Frank Kimbrough, files memorandum in opposition to motion to dismiss. Cert. of service thereon. Card to Jim.

6-17-69 Defendants file Reply Memorandum on Motion to Dismiss with proof of service thereon.

6-19-69 Defendants file Additional Argument on Motion to Dismiss with proof of service thereon.

6-27-69 Government files Supplemental Memorandum in Opposition to Motion to Dismiss with certificate of service attached thereto.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment.
The motion to dismiss is DENIED. (SE) Beamer:J. (copies to counsel).
Memorandum attached thereto.

12 jurors but not less than ten. Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants waive presentation of opening statement and reserve right to present opening statement at the close of Governments evidence. Government presents evidence, concludes and rests. At the close of Governments evidence and in the absence of the jury defendants move for a directed verdict of acquittal. Arguments heard. Motion denied. Jury in attendance defendants present evidence but does not conclude. Cause continued for further trial to December 16, 1970, at 9:30 a.m.

12-16-70 Trial resumed. Defendant presents further evidence, concludes and rests. Government presents rebuttal evidence, concludes and rests. Both sides rest. At the conclusion of all of the evidence all defendants move for judgment of acquittal. Motion denied. Government presents closing argument. Defendants present closing argument. Government presents final argument. Court tenders instructions numbered 1-19 and gives all. No. 7 is given as modified. Government tenders instructions numbered 1-14 and Court gives all. Defendants tender instructions numbered 1-2 and Court refuses both. Court instructs the jury. Bailiff sworn.

11:45 a.m. Jury retires to commence deliberation.
U. S. Marshal authorized to provide meals for the jury.

2:45 p.m. **Jury returns into open court with the following verdicts:**

"We the Jury, find the defendant, Edward Joseph Misiolek, guilty as charged." signed Joseph M. O'Brien, Foreman.

"We the Jury, find the defendant, Robert Ray Tumlin, guilty as charged." signed Joseph M. O'Brien, Foreman.

"We, the Jury, find the defendant, Alex Strosky, guilty as charged." signed Joseph M. O'Brien, Foreman.

Defendants to remain at liberty pending presentence investigation.

1- 8-71 **Parties file stipulation for return of seized money. Card to Paul. Defendant, Edward Joseph Misiolek, present in court with counsel, Charles W. Grubb. Deft. sentenced: 2 yrs.; 6 mos. to be served—upon release from institution deft. placed on probation for period of 3 yrs. on Count 1. Same sentence as to Cts. 2, 4 and 5, to run concurrently. Execution of sentence stayed pending appeal. Defendant to be at liberty on bond heretofore filed pending appeal. Judgment and Commitment issued. (SE)**

1- 8-71 **Beamer: J. Defendant, Robert Ray Tumlin, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs., suspended and deft. placed on probation for 3 yrs. as to Count 1. Imposition of sentence withheld as to Counts 2, 3, 4 and 5. Execution of sentence stayed pending appeal. Defendant to be a liberty on bond heretofore filed pending appeal. Judgment and Order of Probation issued.**

DOCKET ENTRIES & INDICTMENT

1- 8-71 (SE) Beamer, J. Defendant, Alex Strosky, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs.; 6 mos. to be served upon release from institution deft. placed on probation for 3 yrs. Imposition of sentence withheld as to Counts 2, 3, 4 and 5. Deft. placed on probation for 3 yrs. Execution of sentence stayed pending appeal. Deft. to remain at liberty on bond heretofore filed pending appeal. Judgment and Commitment issued.

1- 8-71 (SE) Beamer: J. Receipt filed re Stipulation for Return of Seized Money filed January 8, 1971.

1-15-71 Defts. Misiolek, Tumlin and Strosky file Notice of Appeal. Clerk's Certificate issued and sent to U.S. Court of Appeals. Appeal Due: Feb. 23, 1971.

[Title Omitted]

1 Filed April 10, 1969 (Caption No. 38)

INDICTMENT

COUNT I

The Grand Jury charges:

From on or about the 5th day of September, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Edward Joseph Misiolek, Robert Ray Tumlin, Alex Strosky, Joseph Barnett and Roy Woodward, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together

and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952 (a) (3), all in violation of Title 18, United States Code, Section 371.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants, Edward Joseph Misiolek and Alex Strosky, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendants would make arrangements with other

co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, Roy Woodward.

(f) It was a further part of the said conspiracy that Roy Woodward, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Robert Ray Tumlin, defendant, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said conspiracy and bookmaking activity.

At the approximate times hereinafter mentioned, the defendants, Edward Joseph Misiolek, Robert Ray Tumlin, Alex Strosky, Joseph Barnett and Roy Woodward, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered

Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

2. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

4. On the 5th day of September, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin and Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

5. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

6. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

7. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sport News.

8. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

9. On the 6th day of September, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin, and Alex Strosky entered the Four Aces Recreation.

10. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

11. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

12. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

13. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

14. On the 22nd day of October, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin, Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111-112th Street, Hammond (Roby), Indiana.

15. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

16. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

17. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

18. On the 23rd day of October, 1968, in the Northern

District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

19. On the 23rd day of October, 1968, in the Northern District of Indiana, defendants, Robert Ray Tumlin, Joseph Barnett, Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

20. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

COUNT II

The Grand Jury further charges:

On or about the 5th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statute (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, manage-

ment, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

COUNT III

On or about the 6th of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Alex Strosky, Joseph Barnett and Robert Ray Tumlin, and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

On or about the 22nd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in inter-

state commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

COUNT V

The Grand Jury further charges:

On or about the 23rd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the

Northern District of Indiana, to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney

/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice

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29 Filed May 1, 1969. (Caption No. 38)

MOTION TO DISMISS INDICTMENT

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on April 10, 1969, and for a discharge of all defendants therein charged, on the ground that the allegations contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P.O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

BRIEF IN SUPPORT
OF MOTION TO DISMISS

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 1st day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

30 Filed May 2, 1969. (Caption No. 38)

BRIEF IN SUPPORT OF MOTION
TO DISMISS INDICTMENT

The defendants stand charged with violating Sections 1952 (a) (3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs Illinois Bell Telephone and Kelly vs UPI in (7th CCA) 325 Fed. Facts in 210 F. Supp. 456 2nd 148. See also

US vs Kelly (6th CCA 1964, Ky.) 328 Fed. 2nd 227.

A 1967 decision in US vs Arnold, (4th CCA Va.) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility' * * * to * * * promote * * * any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts."

We must construe Sections 1952 and 1953 in pari materia. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility is not banned.

BRIEF IN SUPPORT OF MOTION TO DISMISS AND ORDER DENYING MOTION

This is not the use of an interstate facility intended under Section 1952.

It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request a dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb
Attorney for Defendants
P.O. Box 354, Cedar Lake, Ind. 46303

SERVICE OF COPY ON UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 2nd day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

54 Filed December 29, 1969. (Caption No. 38)

ORDER (Caption No. 38)

The defendants have filed a motion to dismiss the indictment. The motion is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Alex Strosky, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

80 Filed December 16, 1970.

UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Robert Ray Tumlin, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

81 Filed December 16, 1970.

UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Edward Joseph Misiolek, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

• • •

85 UNITED STATES DISTRICT COURT
For The
Northern District of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971, came the attorney for the government and the defendant (Tumlin) appeared in person, and[1] by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of[2] not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a) (3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting as charged[3] in 5 Counts of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

JUDGMENT

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that[4] the defendant is hereby sentenced to Two (2) Years imprisonment, sentence suspended and the defendant is placed on probation for a period of Three (3)Years as to Count 1. Imposition of sentence is withheld as to Counts 2, 3, 4 and 5.

Execution of sentence is stayed pending appeal.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the pro-

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[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

bation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

• • •

90 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971 came the attorney for the government and the defendant (Strosky) appeared in person and by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a) (3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting as charged in 5 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

JUDGMENT

Two (2) Years, 6 months to be served. The remaining 1-1/2 Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release as to Count 1.

It Is Adjudged that Imposition of sentence is withheld as to Counts 2, 3, 4 and 5.

Execution of sentence is stayed pending appeal.

Defendant to remain at liberty on bond previously filed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge
Attest: Francis T. Grandys, Clerk

/s/ Hildred Bolsega
Deputy Clerk

/s/ Francis T. Grandys
Clerk

A True Copy Certified this 12th day of January, 1971

/s/ Francis T. Grandy
Clerk

/s/ Marilyn [Illegible]
Deputy Clerk

91 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971 came the attorney for the government and the defendant (Misiolek) appeared in person and by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting

as charged in 4 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) Years, 6 months to be served. The remaining 1½ Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release, as to each of 4 Counts, to run concurrently.

Execution of sentence is stayed pending appeal.

Defendant to remain at liberty on bond previously filed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge.
/s/ Francis T. Grandys
Clerk.

A True Copy:
Attest: Francis T. Grandys, Clerk
By /s/ Hildred Bolsega
Deputy Clerk.

(Seal)

A True Copy. Certified this 12th day of January, 1971.
(Signed) Francis T. Grandys
Clerk.
(By) Marilyn [Illegible]
Deputy Clerk.

88 Filed January 15, 1971.

(Caption No. 38) NOTICE OF APPEAL

Notice is hereby given that Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 8th day of January, 1971.

Dated: January 15, 1971

/s/ Charles W. Grubb
Charles W. Grubb
P.O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants